IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

SHARON G. NOBLE
APPELLEE/PETITIONER BELOW,

V. NO. 34328

DEPARTMENT OF TRANSPORTATION,
DIVISION OF MOTOR VEHICLES AND
COMMISSIONER JOSEPH CICCHIRILLO,
APPELLANTS/RESPONDENTS BELOW,

BRIEF OF APPELLEE

Now comes the Appellee, Sharon G. Noble, by her counsel, Paul S. Detch, and responds to the Brief of the Appellants as follows:

I.

KIND OF PROCEEDING AND NATURE OF THE RULING BELOW

The petitioner below, Sharon G. Noble, the Appellee, was arrested by a Municipal Police Officer, Patrolman Hopkins of the Ronceverte Municipal Police Department and charged with driving under the influence of alcohol in violation of the Municipal Ordinance of the City of Ronceverte. Sharon Noble breathalyzer test results were .099.

The petitioner, Sharon G. Noble, requested and was granted an administrative hearing. At the administrative hearing, Sharon G. Noble was represented by her first counsel, Eric Francis. The hearing was conducted February 15, 2007.

W. Va..Code §17C-5A-2(e) is a portion of the statute that controls administrative hearings dealing with driving under the influence and loss of license proceeding. From the evidence taken at the hearing, the commissioner is required by statute to "make specific findings

as to: (1) whether the arresting law enforcement officer had reasonable grounds to believe the person to have been driving while under the influence of alcohol, controlled substances or drugs, (2) whether the person was lawfully placed under arrest for an offense involving driving under the influence of alcohol, controlled substances or drugs, or was lawfully taken into custody for the purpose of administering a secondary test; and (3) whether the tests, if any, were administered in accordance with the provisions of this article and article five of this chapter."

When the commissioner entered the Order of December 14, 2007. The commissioner failed to make the specific Findings of Fact as required by the above statute.

On appeal to the lower court, the petitioner, Sharon G. Noble's, new counsel, Paul S. Detch appealed that the original Findings of Fact in the commissioner's Order that the statute had not been complied with. Particularly, in regard to the second section (2) above that there was no specific finding of fact whether the person was lawfully placed under arrest, because the petitioner was charged with a municipal offense.

§17C-5-11, (the criminal portion of driving under the influence code) provides in pertinent part "each and every municipal ordinance defining a misdemeanor offense of or relating to driving under the influence of alcohol"-- "shall be null and void effect and of no effect unless ordinance defines such an offense in substantially similar terms as an offense defined under the provisions of this article and such offense contains the same elements as an offense defined herein."

Rule 202 of the West Virginia Rules of Evidence and the cases cited thereunder provide that the Court cannot take judicial notice of municipal ordinances.[1] Courts routinely take judicial

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[1]Town of Moundsville v. Velton, 1891, 13 S.E. 373, 35, W.Va. 217; City of Wheeling v. Black, 1884, 25 W.Va. 266; Childers v. Civil Service Commission, 1971, 155 W.Va. 69, 181 S.E. 2d 22; Nesbitt v. Flaccus, 1964, 138 S.E. 2d 859, 149 W.Va. 65; Barniak v. Grossman, 1956, 93 S.E. 2d 49, 141 W.Va. 760; Rich v. Rosenshine, 1947, 45 S.E. 2d 499, 131 W.Va. 30; Elswick v. Charleston Transit Co., 1945, 36 S.E. 2d 419, 128 W.Va. 241; Brannon v. Perkey, 1944, 31 S.E.

notice of criminal complaints.

On appeal to the lower court, the Department tried to argue that the arresting officer had testified he had charged Sharon G. Noble with a State crime of 71C-5 of the code. An easily proven falsehood in the face of the criminal complaint issued by the city. (See Exhibit A).

The lower court judge, the Honorable Judge Tod Kaufman, remanded the proceedings for further hearing to determine whether the municipality or the arresting officer wanted to offer proof Sharon G. Noble was, in fact, charged with a State crime and wanted to make a record to establish the requirements under §17C-5A-2(e)(2) cited above and were to permit the municipality to prove their ordinance complied with State Code. At the remand hearing, the municipality failed to introduce into evidence a copy of the municipal ordinance under which Sharon G. Noble had been arrested and charged. The municipality could offer no proof Sharon G. Noble was ever charged with a State crime. Instead, the Department attempted to rely upon a written statement made by the arresting officer, which followed the arrest, but which made no mention of the ordinance. The Department could not then, as it cannot now, claim Sharon G. Noble was ever charged under 17C-5-2 of the code.

When the matter came back up before the Honorable Judge Tod Kaufman, the lower court reversed the commissioner's Final Order on the basis that "the statement submitted by the arresting officer said nothing regarding the municipal ordinance under which she was arrested. Furthermore, there was no evidence that such ordinance was presented at the administrative hearing. There would be no way for the commissioner to ascertain whether or not the municipal ordinance under which Ms. Noble was arrested has the same elements as the offense of driving under the influence as set out in W.Va. Code §17C-5-2." The municipality prosecuting this

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2d 898, 127 W.Va. 103, 158 A.L.R. 631.

matter was afforded two opportunities to provide the evidence by which the commissioner could make a determination as to whether §17C-5-2(e) (2) and (3) of the code had been complied with. Judge Kaufman overturned the ruling of the administrative hearing and reinstated the driving privileges of Sharon G. Noble.

The Commissioner of Motor Vehicles seeks to overturn the ruling by the lower court, which Appellee resists.

II.

ISSUES

The issues before the Court would be better phrased: (1) "When the legislature requires that the Department of Motor Vehicles to make a specific finding of facts, and there is nothing on the record supporting the mandatory findings of fact; can the administrative order be set aside? (2) Can the Department base a decision on what is an easily proven false evidence?

III.

ARGUMENT

17C-5A-2(e) of the code requires "from the record taken at the hearing the commissioner shall make specific findings as to (2) whether the person was lawfully placed under arrest.

Learned counsel for the Department begins her argument by quoting the arresting officer from the hearing, "with reasonable grounds, I lawfully arrested or lawfully took into custody the below named driver and/or vehicle owner for violating Code section 17C-5-2." At the appeals hearing there was introduced and shown to the lower court judge the warrant for arrest, issued by the Municipal Court of the City of Ronceverte, which charged a municipal violation, not a State violation. (See Exhibit A attached hereto). The Respondent conceded, as it must, that Sharon G. Noble was never arrested for violating 17C-5-2 of the Code of West Virginia and that this is a

false statement. Sharon G. Noble was charged with a municipal violation as proven by the public record.

Counsel for the Department now argues that the administrative hearing examiner, the lower court and this Court are to base a decision upon knowingly false evidence. (i.e. Appellant was charged with a municipal violation, but the Court is to pretend the Appellant was charged with a State Code violation). Counsel for the Department claims that the administrative decision is to be based only on the record before it, even if it is easily proven to be false. This argument was negated when the lower court judge remanded the case for further hearing. At the remand hearing, the municipality did not introduce into evidence a copy of the relevant portions of the municipal code under which the petitioner, Sharon G. Noble, had been arrested and charged nor did the municipality offer a State code warrant. When the matter was returned to Judge Kaufman, the Department's counsel attempted to vouch the record on the remand hearing before Judge Kaufman, claiming she had read the ordinance, that the elements in the municipal ordinance were, in fact, the same and that the Department should be able to doctor the administrative records post mortem. Now the Department complains to this Court that even though the Department did not introduce any of the municipal ordinance required to comply with §17C-5A-2(e)(2) of the code, that the decision should be based upon the record before the hearing examiner even though it is clearly false. [2]

The clear evidence before this Court is that Sharon G. Noble was arrested in the Municipality of the City of Ronceverte for violating a municipal ordinance. Exhibit A. The ordinance was never presented as evidence, even though the municipality was given two

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[2]Counsel also want to use a statement supplied to the commissioner from the police officer's report: This is barred under Rule 803(8)B.

opportunities to make a record.

The Department now wants the Supreme Court to change 200 years of jurisprudence in claiming that an administrative hearing can be based upon a known and proven falsehood, i.e. Sharon G. Noble was charged under §17C-5-2 of the code, when she was not. The Department wants this Court to take a position that a person can be convicted and lose his license under what is an easily proven false statement.[3] The Honorable Judge Kaufman seemed to grasp the question of: "How much false evidence is the Court going to allow the State to use?" Is the Defendant now going to be permitted to use false evidence also?

A. This issue should be laid to rest: Sharon G. Noble was arrested and charged with a municipal ordinance violation, not 17C-5-2. If Sharon G. Noble was not charged with a municipal violation, then why is the Department expending energy on a straw issue. Had the commissioner made the specific findings mandated by 17C-5A-2(e)(2), this issue would have been simplified. All the Department would have to do is produce a warrant charging 17C-5-2 of the code issued against Sharon G. Noble.

II. 17C-5-11 of the Code of West Virginia makes a municipal ordinance void if it does not comply with the State Code. The cases cited under Rule 202 of the West Virginia Rules of Evidence[4] state that a longstanding position that the Court's will not judicial notice of municipal ordinances. The lower court stated "there would be no way for the commissioner to ascertain

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[3]Counsel is not accusing the officer of intentionally providing false evidence, but it is based on human error, not human culpability. It can not be denied that the statement is false.

[4]Town of Moundsville v. Velton, 1891, 13 S.E. 373, W.Va 217; City of Wheeling v. Black, 1884, 25 W.Va. 266; Childers v. Civil Service Commission, 1971, 155 W.Va. 69, 181 S.E. 2d 22; Nesbitt v. Flaccus, 1964, 138 S.E. 2d 869, 149 W.Va. 65; Barniak v. Grossman, 1956, 93 S.E. 2d 49, 141 W.Va. 760; Rich v. Rosenshine, 1947, 45 S.E. 2d 499, 131 W.Va. 30; Elswick v. Charleston Transit Co., 1945, 36 S.E. 2d 419, 128 W.Va. 241; Brannon v. Perkey, 1944, 31 S.E. 2d 898, 127 W.Va. 103, 158 A.L.R. 631.

whether or not the municipal ordinance, in which Ms. Noble was arrested, has the same elements as the offense of driving under the influence as set out in West Virginia Code 17C-5-2." Counsel for the Department had no answer to the lower court and offers none in her brief as to how the Court is to make a specific finding that a person was lawfully placed under arrest, if one doesn't know and have any proof offered that the ordinance was not null and void. Arguably, if the cities ordinance was null and void, then the person could not be lawfully placed under arrest.

An additional problem arises under 17C-5A-2(e)(3) which deals with the test administered. How can the Department and the commissioner rule on tests for which no rules are offered.

What the Department and the Commissioner really want is: they want to able to make administrative decisions based solely upon 17C-5A-2(d) "the principal question shall be whether the person did drive a motor vehicle while under the influence of alcohol." The Department wants to ignore the mandated requirements as set out in Paragraph (e) of the same code section. The lower court took the position that the mandated requirements of 17C-5A-2(e) be complied with. This Court should do the same and that there should be at least some supporting evidence to show the compliance.

IV. The Department complains that the Appellee, Sharon G. Noble, should have complained at the initial administrative hearing that the Final Order of the commissioner lacked evidence to make a specific finding as to how the petitioner was lawfully placed under arrest for an offense of driving under the influence. The commissioner appears to imply that the petitioner should be clairvoyant and anticipate the wording of the commissioner's ruling.

Echoing in the words of Judge Kaufman, the rhetorical question is posed "if you do not know what the petitioner was charged with and the elements of the offense or whether that

ordinance is even null or void, then how can the commissioner make a specific finding that Sharon G. Noble was lawfully arrested." The brief from the Department suggests that the answer is as follows: "just pretend that the petitioner was charged with a State Code violation, even though we know that's a false statement."

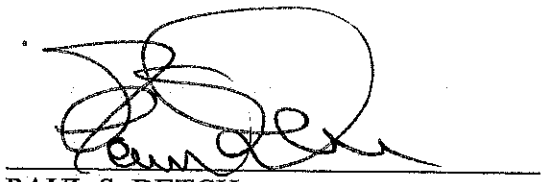
The commissioner argues that somehow it is too difficult for municipal police officers to bring an appropriate portion of their municipal code as part of their proof to the hearing. The commissioner wants the arrestee to prove the ordinance and to place the burden of proof on the arrestee. 29A-5-2(a) provides that at the administrative hearings "the rules of evidence applied in civil cases in circuit courts of this State shall be followed." The Appellee contends that this means the burden of proof to establish a particular thing is upon the person asserting the issue. That is, the complaining party or the municipality in this case, must present sufficient proof to establish that the party was lawfully arrested. In order to be able to prove the person was lawfully arrested, one must show that it had a valid ordinance that was not null and void.

There is no reason that there should be a special exception made to the Commissioner of the Department of Motor Vehicles requiring that the burden of proof be shifted to lay persons seeking to defend their license. It is a small burden to request that a copy of the municipality be provided to the hearing examiner and made a part of the record.

CONCLUSION

The lower court's ruling should be affirmed.

SHARON G. NOBLE
By Counsel



PAUL S. DETCH
201 N. COURT STREET
LEWISBURG, W.VA. 24901
W.VA. BAR NO. 1002

CERTIFICATE OF SERVICE

I, Paul S. Detch, hereby certify that a true and exact copy of the foregoing BRIEF OF APPELLEE was served upon Janet James, Assistant Attorney General, Attorney General's Office, Building 1, Room W-435, 1900 Kanawha Boulevard, East, Charleston, W.Va. 25305 by mailing a true and exact copy by regular United States mail, postage paid on this 26 day of November, 2008.

Paul S. Detch

EXHIBIT
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IN THE MUNICIPAL COURT OF RONCEVERTE, WEST

MUNICIPALITY OF RONCEVERTE
V
SHARON GRAY NOBLE
Defendant

Cas

x Adult
___ Juvenile

~~FLAT MT. ROAD APT. #1 ALDERSON WV 24910~~ P.O. Box 82
Ronceverte, WV 24970
Address
229-90-8230
Social Security No.
D051000
Driver's License No.
1/23/1958
Date of Birth

CRIMINAL COMPLAINT

I, the undersigned complainant, being duly sworn, state the following is true and correct to the best of my knowledge and belief.

On or about 1/12/2007 (date) in Ronceverte, West Virginia (municipality) the defendant(s) did: (STATE/MUNICIPAL ORDINANCE LANGUAGE OF OFFENSE)

(SEE STATE / MUNICIPAL ORDINANCE LANGUAGE CONTINUED)

in violation of Municipal Ordiance No: 3-17-1. I further state that this complaint is based on the following facts:

(SEE FACTS CONTINUED)

Continued on attached sheet? x Yes ___ No

Complainant:
SFC. J. W. Hopkins
Name:
300 West Main Street
Ronceverte, WV 24970
Address
(304) 647-5720
Telephone

Signature of Complainant 1/12/07 Date:

Sworn or affirmed before me and signed in my presence.

Signature of Municipal Judge

12 Jan 07
Date

CID FORM: MUN-7 (1/96)

IN THE MUNICIPAL COURT OF RONCEVERTE, WEST VIRGINIA

MUNICIPALITY OF RONCEVERTE

V

Sharon G Noble
Defendant

Flat Mt. Road Apt. # 4 Alderson 24910
Address

229-90-8230
Social Security No.

D051000
Driver's License No.

1/23/1958
Date of Birth

CRIMINAL COMPLAINT CONTINUATION SHEET

While on patrol the undersigned officer noticed a early model Ford truck traveling North on 219 with a defective tail light the officer also noticed the vehicle swaying to the side of the road and traveled across the center line the officer signaled the vehicle to stop the defendant was slow to respond . The officer spoke with the defendant the defendant had a strong odor of and alcholic beverage on her breath and spoke with slurred speach .The oficer ask the defendant to exit the vehicle the defendant was unsteady when exiting the vehicle the defendant failed the field test and admitted to drinking a least two beers. The defendant was placed under arrest and transported to Lewisburg for the intoxilizer test with the result of .099.

Complainant:

Name: J W Hepler

Signature of Complainant

Date: 1/12/07

CID FORM: MUN-7A (1/96)